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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 245

ZIFFRIN, INCORPORATED,
*Appellant,*

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
*Appellees.*

## BRIEF FOR APPELLANT

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November 28, 1942.

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 245

ZIFFRIN, INCORPORATED

*Appellant,*

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

*Appellees.*

## BRIEF FOR APPELLANT

### I. REFERENCE TO OFFICIAL REPORT OF OPINION BELOW

No opinion was delivered in the court below. The special findings of fact and conclusions of law filed and the judgment entered in the court below are not officially reported, but are set forth in full in Appendix "A" of this brief.

### II. GROUNDS UPON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

The judgment of the district court was entered June 4, 1942. (R. 66.) The petition for appeal (R. 68, 69,

70, 71) was filed June 10, 1942 and the order allowing the appeal (R. 73) was entered the same day. On October 12, 1942 this court noted probable jurisdiction. (R. 458.) Jurisdiction is conferred on this court by Act of Congress of March 3, 1911, Chapter 231, Sec. 210, 36 Stat. 1150 and by the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. 220, United States Code, Title 28, Sec. 47a, section 210 of Judicial Code.

This action arises under the Fifth Amendment to the Constitution of the United States and under the laws of the United States, 54 Stat. 916, Section 17 (9) of Part I of the Interstate Commerce Act, United States Code, Title 49, Sec. 17 (9); Section 205 (g) of Part II of the Interstate Commerce Act, 49 Stat. 550, 54 Stat. 922, United States Code, Title 49, Sec. 305 (g); and Act of Congress October 22, 1913, Ch. 32, 38 Stat. 219, 38 Stat. 220, United States Code, Title 28, Sec. 41 (28), 43-48, 45a and 47a.

Jurisdiction of the Supreme Court of the United States is invoked on the grounds that the judgment of the district court (R. 66) which dismissed appellant's petition (R. 1-44, Ex. 1, R. 85) for an order to vacate, set aside and permanently enjoin the enforcement of a certain order of the Interstate Commerce Commission entered May 29, 1941, in its docket No. MC 2511, entitled Ziffrin, Incorporated, Contract Carrier Application (R. 13-36, Ex. 1, R. 85), deprives appellant of its property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States and is contrary to law.

The order of the Interstate Commerce Commission entered May 29, 1941 in its docket No. MC 2511, entitled Ziffrin, Incorporated, Contract Carrier Application, (R. 13-36, Ex. 1, R. 85), is reported at 28 M. C. C. 683.

The effect of said order of the Interstate Commerce Commission and the judgment of the court below is to totally destroy the business of appellant which is of a value of not less than five hundred thousand dollars. (R. 89, 90, 91.)

## III. STATEMENT OF THE CASE

This case comes before this court on appeal (R. 73) from the judgment (R. 66) of a specially constituted statutory three judge court sitting as the United States District Court for the Southern District of Indiana, (R. 46) and involves the validity of an order of the Interstate Commerce Commission entered May 29, 1941, in its cause No. MC 2511. (R. 13-36, Ex. 1, R. 85.)

The appellant, Ziffrin, Incorporated, plaintiff below, seeks in this action to restrain and enjoin the appellees, United States of America and Interstate Commerce Commission, defendants below, from enforcing the provisions of an order of the appellee, Interstate Commerce Commission, and to vacate and set aside said order, denying appellant the right to continue in operation as a contract carrier of property by motor vehicle in interstate and foreign commerce, (R. 13-36, Ex. 1, R. 85), a business in which appellant has been continuously engaged since 1933. (R. 363, Ex. 3, R. 85.) Hereafter in this brief, reference to the appellee will mean the appellee, Interstate Commerce Commission, unless specific reference is made to the appellee, United States of America.

In the court below, appellant's complaint was dismissed for want of equity which had the effect of sustaining the validity of the order of the appellee, Interstate Commerce Commission, involved herein. (R. 66.) The order complained of found that appellant has operat-

ing rights under the so-called "grandfather" clause of the Motor Carrier Act of 1935, by reason of bona fide operation on July 1, 1935 and continuously since, but denied a permit to appellant to continue said operation because appellant and Ziffrin Truck Lines, Inc., a common carrier by motor vehicle engaged in interstate commerce, were owned, managed and controlled in a common interest and the holding of a permit by appellant would not be consistent with the public interest. (R. 33, 34, Ex. 1, R. 85.)

The taking of evidence before the Interstate Commerce Commission was concluded September 13, 1938 (R. 356, Ex. 3, R. 85) at which date the statute applicable to the holding at the same time of a certificate and a permit was 49 Stat. 554, the original Sec. 210 of the Motor Carrier Act of 1935, effective August 9, 1935. Two years after the taking of evidence, to-wit, on September 18, 1940, said section 210 of the Motor Carrier Act of 1935 was amended, 54 Stat. 919, 923, U. S. Code, Title 49, Sec. 310. On May 29, 1941 the Interstate Commerce Commission entered the order complained of (R. 35, Ex. 1, R. 85) and on September 29, 1941 appellant's petition for rehearing was denied (R. 44, Ex. 1, R. 85) which denial of rehearing, unless relief is granted by this court, forever precluded appellant from submitting evidence to show its compliance with said Section 210 as amended on September 18, 1940.

The appellee construes said original Section 210, 49 Stat. 554 as prohibiting the issuance of a permit to appellant. (R. 32, Ex. 1, R. 85.) Appellant construes said original Section 210, 49 Stat. 554 as not applicable to appellant, which was one of two separate corporate identities, under common management and control effectuated prior to the passage of the Motor Carrier Act of 1935. (R. 262, 263, 363, 370, Ex. 3, R. 85.)

The appellant, Ziffrin, Incorporated, is an Indiana corporation having its principal place of business at Indianapolis, Indiana, and was organized in March, 1933. (R. 363, Ex. 3, R. 85.) The appellant has been continuously engaged in the transportation of property by motor vehicle in interstate and foreign commerce since 1933, and was particularly so engaged on July 1, 1935 (the "grandfather" date of the Motor Carrier Act for contract carriers) and continuously since. (R. 255, Ex. 3, R. 85.)

On February 4, 1936 the appellant, Ziffrin, Incorporated, seasonably filed with the Interstate Commerce Commission under Section 209a, the so-called contract carrier "grandfather" clause of the Motor Carrier Act of 1935, 49 Stat. 552, U. S. Code, Title 49, Sec. 309, quoted in Appendix B of this brief, its application, as later amended, for a permit authorizing continuance of its operations alleging that it had been continuously since prior to July 1, 1935 engaged in interstate and foreign commerce as a contract carrier of canned, preserved and prepared foodstuffs, shoe polish and dressings, packing house products and fresh meats, alcoholic liquors, distillery supplies, including bottles, milk, condensed and evaporated, dairy products, including oleomargarine, cheese, paper products and paper articles, steel and iron articles and batteries between all points and places in that part of the state of Kentucky within a radius of 150 miles of Louisville, all the State of Indiana, all of the State of Ohio, all of the State of Illinois, St. Louis, Missouri, Milwaukee, Wisconsin, and points in Wisconsin intermediate between Milwaukee and Chicago and that part of the State of Pennsylvania in and around the cities of Pittsburgh and Schenley. (R. 94A, 94B, 94C, 94D, 106, Ex. 2, R. 85.)

This application was received by the appellee and docketed as its case No. MC-2511. (R. 14 Ex. 1, R. 85.) On

the same date and at the same time, Ziffrin Truck Lines, Inc., the common carrier company heretofore referred to, filed its application under the "grandfather" clause of the Motor Carrier Act for common carriers, being Section 206a of the Motor Carrier Act of 1935, 49 Stat. 551, U. S. Code, Title 49, Sec. 306, which application was received by the Interstate Commerce Commission, made the subject of certain hearings without reference to the application of appellant, and said application of said Ziffrin Truck Lines, Inc., was granted by the appellee and a certificate as a common carrier issued to said Ziffrin Truck Lines, Inc., without reference to the questions raised against appellant by appellee. The proceedings had in reference to said common carrier are reported at 6 M. C. C. 722.

The appellant was not a party to any of the proceedings had in connection with said common carrier, but the record made in the proceedings involving said common carrier was considered by the appellee in deciding the case of appellant, and portions of the record of said common carrier case to which appellant was not a party were made the determining factor of certain of the findings of the appellee. (R. 27, Ex. 1, R. 85.)

Following the filing of appellant's application with the appellee said application was referred by the appellee to the District Supervisor of its Bureau of Motor Carriers at Indianapolis to determine the operating rights of the appellant, and after showings made by appellant to said Supervisor, the appellant and said Supervisor entered into a written agreement dated August 23, 1937, in which the appellant agreed to restrict its operations to those set out in said agreement, and said Supervisor, as the agent of appellee, agreed that the appellant was entitled without further proceedings and without public

hearing to a permit to transport the commodities set out in said agreement to points and places set out in said agreement. (R. 36, 37, 38 Ex. 1, R. 85.)

On March 12, 1938 the appellee issued what it calls a compliance order stating that upon full compliance with Sections 215 and 218 of the Motor Carrier Act of 1935, a permit shall be issued authorizing appellant to engage as a contract carrier by motor vehicle in interstate and foreign commerce, said permit to authorize transportation of the commodities in the territory set out in an appendix attached to said compliance order, which appendix authorizes the same commodities and points and places as set out in the agreement with the Supervisor of the appellee. (R. 38, 39, 40, Ex. 1, R. 85.)

Appellant immediately fully and completely complied with the provisions of said compliance order, including the restriction of its operations to the territory and commodities set out therein, and continued its operations pursuant to the provisions of said compliance order. (R. 144, 145, Ex. 3, R. 85.)

On June 4, 1938, without any notice to appellant, the appellee issued its order in Cause No. MC-2511 vacating and setting aside its order of March 12, 1938. (R. 42, Ex. 1, R. 85.)

On June 23, 1938 the appellee issued its order stating that the application of appellant in Cause No. 2511 was set for public hearing on July 19, 1938 at Indianapolis, Indiana, and purporting to give notice to appellant that it would be required to make certain showings relative to the corporate relationship between appellant and Ziffrin Truck Lines, Inc., and also purporting to require appellant to make said showings pursuant to the provisions of nonapplicable sections of Part I of the Inter-

state Commerce Act dealing exclusively with railroads and having at that time no application whatsoever to motor vehicle carriers. (R. 43, Ex. 1, R. 85.)

The date of the hearing was changed by the appellee from July 19, 1938 to September 12, 1938, but no other change was made in the order and notice of June 23, 1938. (R. 107, 108, Ex. 3, R. 85.)

On September 12 and 13, 1938, public hearing was had on the application of appellant and on the matters set out in the order of the appellee dated June 23, 1938, before an examiner of the appellee. (R. 132, Ex. 3, R. 85.) Following the filing of briefs the examiner filed his report and order recommending the granting of a permit to appellant, but also recommending the curtailment of the authority theretofore issued to Ziffrin Truck Lines, Inc., in spite of the fact that Ziffrin Truck Lines, Inc., had never been made a party to this proceeding before appellee. (R. 109-130, Ex. 3, R. 85.)

The appellant filed its exceptions to the report and order recommended by the examiner, excepting in part only to the findings of said examiner. The appellant requested an opportunity to present oral argument in support of its exceptions. (R. 422, Ex. 3, R. 85.)

On May 26, 1939 the appellee permitted the intervention as parties in said proceeding, three protestant motor carriers, although the hearing had been completed, briefs had been filed, and an examiner's report had been made. (R. 15, Ex. 1, R. 85.)

On October 27, 1939 oral argument was held before Division 5 of the appellee in said proceedings at Washington, D. C., at which time the appellant and certain other parties presented argument to said division of the appellee. (R. 422, Ex. 3, R. 85.)

The case was submitted to said Division 5 for decision on October 27, 1939, but said Division 5 did not decide said case for a period of nineteen months, or almost two years, and until after Section 210 of Part II of the Interstate Commerce Act had been amended by Congress, completely changing the law applicable to the evidence taken at the public hearing held September 12 and 13, 1938. (R. 13, Ex. 1, R. 85.)

On May 29, 1941 Division 5 of the appellee issued its order in Cause No. MC-2511 to be effective July 15, 1941, completely denying appellant's application, which order is the order complained of in this action. (R. 35, 36, Ex. 1, R. 85.)

On June 25, 1941 appellant filed with the appellee its petition seeking reconsideration, reargument and rehearing of its application, and requesting oral argument on said petition.

The appellee extended the effective date of the denial order of May 29, 1941 to October 15, 1941, and again extended the effective date to November 5, 1941. (R. 131, 132, Ex. 3, R. 85.)

On September 29, 1941 the appellee denied appellant's petition filed June 25, 1941 for reconsideration, reargument and rehearing. (R. 44, Ex. 1, R. 85.)

On October 21, 1941 appellant filed its complaint in the United States District Court for the Southern District of Indiana, seeking a temporary restraining order, interlocutory injunction and final decree, vacating, setting aside and enjoining the enforcement of the order of the appellee dated May 29, 1941. (R. 1.)

On October 27, 1941 a partial hearing was held before a three judge court on appellant's motion for an inter-

locutory injunction, and at that time, upon the suggestion of the court, the appellee agreed to extend the effective date of its order beyond November 5, 1941, which made it unnecessary to proceed further on appellant's application for an interlocutory injunction. (R. 48.)

Final hearing before the court below was held on January 17, 1942, and thereafter the judgment of the court below was entered as heretofore set out. (R. 78, 66.) Although the court below dismissed the appellant's complaint or want of equity, it nevertheless granted appellant a temporary injunction restraining the appellees from forcing the order complained of pending determination of this appeal by this court, (R. 76, 77); and appellant is now operating under the protection of said injunction.

At the outset of the hearing of evidence by the examiner of the appellee on September 12, 1938, which is the evidence upon which the appellee based its decision, the appellant, by its counsel, protested against being required to participate in a hearing ordered by a notice requiring appellant to make certain showings under a law not then applicable to appellant or any other motor carrier, but applicable only to railroads. (R. 250, 251, 252, Ex. 3, R. 85.) The portion of the notice of hearing referred to which was included in the order of the appellee of June 23, 1938, is as follows:

> "Notice is hereby given that although application herein is for a certificate or permit on form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc. (No. MC 2510) and if said applicant and the Ziffrin Truck Lines, Inc., are found to be affiliated within the meaning of Section 5 (6) of Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the pol-

icy declared in Section 202 (a) of the Motor Carrier Act, 1935, within the meaning and contemplation of section 210 of said Motor Carrier Act, 1935." (R. 43, Ex. 1, R. 85.)

Appellant's objections to proceeding under this defective notice was overruled, (R. 252, Ex. 3, R. 85) and the hearing was divided into two sections, one having to do with applicant's operating rights under the Motor Carrier Act of 1935, and the other having to do with the matters set out in the portion of the notice referred to above. R. 136, 137, 138, Ex. 3, R. 85.) Appellant in that portion of the hearing before the appellee covering its relationship with Ziffrin Truck Lines, Inc., submitted evidence of its compliance with the then existing applicable law which was Section 210 of the Motor Carrier Act of 1935. (R. 252-356, Ex. 3, R. 85.)

The appellant, on September 12 and 13, 1938, through the testimony of Mr. Sam Ziffrin, of Indianapolis, Indiana, and certain documentary evidence, submitted proof to show the relationship which existed then and which had existed prior to the enactment of the Motor Carrier Act of 1935 between appellant and Ziffrin Truck Lines, Inc. (R. 252-356, Ex. 3, R. 85.) This is the evidence to which the appellee applied the amended section 210 quoted in its order, the law enacted September 18, 1940, more than two years later. Thereafter appellee denied appellant the right to submit evidence as to its compliance with said amended section 210. (R. 44, Ex. 1, R. 85.) The evidence before the appellee, which is in evidence in this proceedings, (R. 132-356, Ex. 3, R. 85), is that as of the date of the hearing September 12 and 13, 1938, and continuously since prior to the enactment of the Motor Carrier Act of 1935, appellant, Ziffrin, Incorporated, and Ziffrin Truck Lines, Inc., are and have been separate and distinct

corporations, (R. 363, 378, Ex. 3, R. 85), both having their principal place of business in Indianapolis, Indiana, (R. 367, 382, Ex. 3, R. 85), the appellant being engaged in business as a contract carrier of property by motor vehicle in interstate and foreign commerce, (R. 255, Ex. 3, R. 85) and Ziffrin Truck Lines, Inc., being engaged in business as a common carrier of property by motor vehicle in interstate and foreign commerce. (R. 256, Ex. 3, R. 85.)

The directors and stockholders of the appellant were, continuously since prior to the enactment of the Motor Carrier Act of 1935, as follows:

| | *No. of Shares* |
|---|---|
| Sam Ziffrin, Indianapolis, Indiana, President | 495 |
| S. O. Berman, Logansport, Indiana | 390 |
| L. Berger, Averne, New York | 100 |
| Rose Levy, Indianapolis, Indiana (Sister of Mr. Ziffrin) | 15 |
| (R. 253, 297, 298, Ex. 3, R. 85.) Total shares | 1,000 |

As to Ziffrin Truck Lines, Inc., the evidence is that Mr. Sam Ziffrin owned 98% of the stock, and that the remaining 2% was held by Esther Ziffrin, Mr. Sam Ziffrin's wife, Dave Ziffrin, their son, and Louis Ziffrin, their son, this company being entirely owned by Mr. Ziffrin, his wife and two sons, with no outside stock ownership whatsoever. (R. 254, Ex. 3, R. 85.) Certified copies of the Articles of Incorporation of the appellant, and Ziffrin Truck Lines, Inc., are in evidence. (R. 363, 378, Ex. 3, R. 85.)

The evidence is that the appellant since its organization has paid Federal Income Tax to the United States Government, (R. 256, Ex. 3, R. 85), and that Ziffrin Truck

Lines, Inc., since its organization has paid Federal Income Tax to the United States Government (R. 256, Ex. 3, R. 85); that the appellant has paid Gross Income Tax to the State of Indiana since the State Gross Income Tax Law was effective, (R. 256, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., has paid Gross Income Tax to the State of Indiana since the State Gross Income Tax Law has been in effect. (R. 256, Ex. 3, R. 85.)

The evidence further is that appellant pays the State and Federal government social security, unemployment compensation and other State and Federal taxes or assessments. (R. 257, Ex. 3, R. 85.)

The evidence further is that Ziffrin Truck Lines, Inc., pays to State and Federal governments social security, unemployment compensation and other State and Federal taxes or assessments. (R. 257, Ex. 3, R. 85.)

The evidence is that appellant had certain employees who worked exclusively for that company, and Ziffrin Truck Lines, Inc., had certain employees who worked exclusively for that company, and that there were certain employees such as auditors who did part time work for appellant and part time work for Ziffrin Truck Lines, Inc. (R. 257, Ex. 3, R. 85.)

The evidence further is that the books and records of the appellant are kept in accordance with the accounting regulations of the Interstate Commerce Commission and are separate and distinct records from those of any other company, and that the books and records of Ziffrin Truck Lines, Inc., (R. 258, Ex. 3, R. 85) are kept in accordance with the accounting regulations of the Interstate Commerce Commission and are separate and distinct from those of any other company. (R. 258, Ex. 3, R. 85.)

The evidence further is that an auditor of the appellee had recently completed an inspection of the books of both appellant and Ziffrin Truck Lines, Inc., and found this to be a fact. (R. 258, Ex. 3, R. 85.)

The evidence is that appellant holds an alcoholic beverage permit from the United States Government, Alcoholic Beverage Division, (R. 258, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., holds an alcoholic permit issued by the United States Government; (R. 258, Ex. 3, R. 85) that the State of Indiana had issued separate authority for the transportation of alcoholic liquors to appellant and to Ziffrin Truck Lines, Inc.; (R. 259, Ex. 3, R. 85) that the appellant holds a contract carrier permit issued by the Public Service Commission of the State of Indiana, (R. 261, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., holds a common carrier certificate issued by the Public Service Commission of Indiana. (R. 262, Ex. 3, R. 85.)

The evidence is that appellant holds a contract carrier permit issued by the State of Ohio, (R. 262, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., holds a common carrier certificate issued by the State of Ohio; (R. 262, Ex. 3, R. 85) that appellant owns and holds title to, in its own name, certain motor vehicle equipment, (R. 262, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., owns and holds title to certain motor vehicle equipment. (R. 262, Ex. 3, R. 85.)

The evidence further is that appellant does not exercise any control or management over Ziffrin Truck Lines, Inc., and that Ziffrin Truck Lines, Inc., does not exercise any control over the appellant, Ziffrin, Incorporated. (R. 262, Ex. 3, R. 85.)

The evidence further is that the services furnished by appellant and Ziffrin Truck Lines, Inc., are entirely dif-

ferent in that appellant since its organization has transported exclusively for certain persons, firms or corporations, and that it has never solicited freight generally or held itself out to serve the public generally since its organization, (R. 264, Ex. 3, R. 85) and that Ziffrin Truck Lines, Inc., has held itself out as a common carrier to serve the general public for the transportation of commodities generally in interstate commerce (R. 264, Ex. 3, R. 85); that only a small portion of the territory heretofore granted to Ziffrin Truck Lines, Inc., by the appellee as a common carrier as to points of origin and destination is the same as that included in the application of appellant as amended (R. 34, 35, Ex. 1, R. 85; 139 Ex. 3, R. 85); that the appellant operates over irregular routes to points and places generally throughout a large territory, (R. 94B, 106, Ex. 2, R. 85) and that Ziffrin Truck Lines, Inc., is a common carrier operating a regular service over certain specific routes set out in the certificate issued by the appellee. (R. 34, Ex. 1, R. 85.)

The evidence further is that the corporate funds of the appellant and Ziffrin Truck Lines, Inc., are entirely separate and distinct and are kept in different banks in the city of Indianapolis, Indiana (R. 316, 317, Ex. 3, R. 85); that where there had been any temporary interchange of equipment between appellant and Ziffrin Truck Lines, Inc., that it had been of the same nature which occurs daily by and between other motor carriers, and that particularly one of the protestant motor carriers in the proceedings before the appellee had interchanged equipment with the appellant in the same manner when said protestant did not have available sufficient trucks to take care of the business offered to it. (R. 328, Ex. 3, R. 85.)

The evidence further is that the appellant has been nationally recognized as a separate and distinct company

as a contract carrier, and that appellant's president at the time of the hearing before the appellee was Vice-President of the American Trucking Associations, Inc., and Chairman of the Contract Carrier Division thereof (R. 266, Ex. 3, R. 85); that the appellant had complied with all the rules and regulations of the appellee governing contract carriers, (R. 255, Ex. 3, R. 85) and had on file with and approved by the appellee bilateral contracts between the appellant and its shippers. (R. 141, Ex. 3, R. 85.)

The evidence further is that the appellant was organized prior to the enactment of the Motor Carrier Act of 1935 for a definite and specific purpose, to-wit, the transportation of alcoholic liquors and beverages (R. 145, Ex. 3, R. 85); that appellant had been requested by representatives of the major distilleries of the United States to undertake the transportation of liquor by reason of the chaotic condition existing in connection with said transportation immediately after the repeal of the prohibition amendment by reason of the hijacking of whiskey upon the public highways of the United States by organized gangsters. (R. 148, 149, Ex. 3, R. 85.) That the appellant pursuant to said request developed a police and convoy system for the protection of alcoholic liquors while in transportation, and that this system had been worked out with the cooperation of local police, state police and federal law enforcement officers in the territory involved. (R. 148, 149, Ex. 3, R. 85.) That this police and convoy system was being maintained by appellant at the cost of approximately Twenty-five thousand ($25,000.00) dollars a year in order to protect its shippers. (R. 148, 149, Ex. 3, R. 85.) That this service was special and peculiar service of the appellant as a contract carrier, and had no connection whatsoever with Ziffrin Truck Lines, Inc., or

any other carrier operating in the United States. (R. 264, 265, Ex. 3, R. 85.)

The appellant introduced evidence of representatives of shippers who had used appellant's service on, before and continuously since July 1, 1935, who testified in detail relative to their use of appellant's service on and after the "grandfather" date, naming with particularity cities and towns and territory where shipments had been transported for them by appellant.

B. M. ANGELL, general traffic manager of Stokely Brothers and Company and Van Camps, Incorporated. (R. 243, Ex. 3, R. 85.)

Mr. Angell testified that his companies are packers of canned fruits and vegetables, with plants throughout the United States, (R. 243, Ex. 3, R. 85) including eleven in the State of Indiana, (R. 243, Ex. 3, R. 85) and testified concerning the service which appellant had rendered to his companies in the transportation of their products in interstate and foreign commerce on, before and continuously since July 1, 1935. (R. 244, Ex. 3, R. 85.)

Mr. Angell testified that his companies had used the services of appellant for transportation of their products in interstate and foreign commerce on, before and continuously since July 1, 1935 in the territory involved in the application of appellant, as amended, (R. 244, Ex. 3, R. 85) which included that part of the state of Kentucky within a radius of 150 miles of Louisville, Kentucky, all points and places in the State of Indiana, all points and places in the State of Illinois, all points and places in the State of Ohio, St. Louis, Missouri, Milwaukee, Wisconsin, and that part of the State of Pennsylvania in and about Schenley and Pittsburgh, Pennsylvania. (R. 243, Ex. 3, R. 85,)

Mr. Angell testified that appellant's service under contract had been used particularly for the delivery of the products of his companies manufactured at their plants in the State of Indiana, which included plants located at Jeffersonville, Whiteland, Greenwood, Indianapolis, Martinsville, Anderson, Elwood, Tipton, Peru and Wabash, all in the State of Indiana. (R. 244, Ex. 3, R. 85.)

Mr. Angell testified that the destination points to which appellant had transported the products of his company from the Indiana canning plants were general throughout the territory included in the application, as amended, and particularly that the appellant had transported the products of his companies to all points and places of 5,000 population or more in the territory included in appellant's application, as amended. (R. 244, Ex. 3, R. 85.)

Mr. Angell further testified that the shipping records of his companies had been largely destroyed when their Jeffersonville, Indiana, warehouse was flooded by the disastrous Ohio River flood of 1936. (R. 245, Ex. 3, R. 85.) He further testified that his companies shipped approximately eight million pounds of merchandise a month by the appellant to points and places in the territory involved, (R. 245, Ex. 3, R. 85) and for that reason he was unable to state details as to the dates, weights and rates of particular shipments from memory, (R. 245, Ex. 3, R. 85) his records having been destroyed in the flood of 1936. (R. 245, Ex. 3, R. 85.)

Mr. Angell testified that he had personally made the original arrangements with the appellant for the transportation of his companies in 1934, (R. 246, Ex. 3, R. 85) and that he had from time to time participated in the preparation and approval of the written contracts by

and between his companies and appellant covering the transportation of the products of his companies in the territory which he had described. (R. 246, 247, Ex. 3, R. 85.)

FRANK H. LUTHER, general traffic manager of Joseph E. Seagram & Sons, Inc., Calvert Distilleries Corp., Carstairs Brothers Company, Inc., Reliance Distilling Company, and other subsidiary companies, and also general traffic manager for the American plant of Seagram, Limited, of Montreal, Canada. (R. 175, Ex. 3, R. 85.)

Mr. Luther testified that his companies had used the services of the appellant for the transportation of alcoholic liquors on, before and continuously since July 1, 1935 in the territory incl[illegible]d in the application of appellant before appellee, as amended. (R. 177, Ex. 3, R. 85.)

Mr. Luther testified that in the so-called open states where there was not a state distribution of alcoholic liquors through state owned stores that the service of appellant had been used to points and places generally. (R. 176, Ex. 3, R. 85.) Mr. Luther testified that the open states involved were Indiana, Illinois, Wisconsin and Kentucky. (R. 176, Ex. 3, R. 85.) He further testified that in the so-called monopoly states where the distribution of alcoholic liquors was through the medium of state owned liquor stores, that the destinations to which applicant had transported alcoholic liquors were specific, and that such states involved in this matter were Pennsylvania and Ohio. (R. 177, Ex. 3, R. 85.)

As to Pennsylvania, Mr. Luther testified that in that portion of the state involved in this application appellant had transported alcoholic liquors to Pittsburgh and New Castle, and that in Ohio appellant had transported alcoholic liquors to Canton, Cleveland, Columbus, Cincinnati

and Toledo, all of said transportation having been performed on, before and continuously since July 1, 1935. (R. 176, Ex. 3, R. 85.)

Mr. Luther testified that the transportation of alcoholic liquors by appellant for his companies had been between Lawrenceburg, Indiana and Louisville, Kentucky, and the points and places generally in the open states and to specific points in the monopoly states. (R. 177, Ex. 3, R. 85.)

EDWARD GUSKEY, general traffic manager of Schenley Distilleries, Inc., which owns, among others, the following distilleries: Schenley Products Company, Schenley Import Corporation, Schenley Distillers Corporation, Schenley Distillers, Incorporated, Joseph Finch Company, Old Quaker Company, New England Distilling Company, George P. Stagg Company, James Pepper Company, Berhnheim Distilling Company, Belmont Distilling Company, George Dickel & Company, Steinhart Company. (R. 193, Ex. 3, R. 85.)

Mr. Guskey testified that his companies had used the services of appellant for the transportation of alcoholic liquors and distillers' supplies in the territory involved in appellant's application, as amended, on, before and continuously since July 1, 1935. (R. 196, 197, Ex. 3, R. 85.) Mr. Guskey testified that his companies had used the services of appellant under contract in interstate transportation, and that he personally had made arrangements for the transportation with appellant in 1934. (R. 202, 203, Ex. 3, R. 85.)

Mr. Guskey testified that he had made a study of the situation regarding the use of appellant's service by his companies, and that his companies had used appellant's service for the transportation of alcoholic liquors and dis-

tillers' supplies on, before and continuously since July 1, 1935, and particularly stated that the service had been used daily into the State of Ohio, to almost every point and place in the State of Illinois, to almost every point and place in the State of Indiana, to Racine, Wisconsin, Milwaukee, Wisconsin and St. Louis, Missouri. (R. 199, Ex. 3, R. 85.)

Mr. Guskey named with particularity some of the points and places in the territory which applicant had transported alcoholic liquors from Lawrenceburg, Indiana and Louisville, Kentucky, including the following cities and towns in Illinois:

> Alton, Aurora, Belleville, Bloomington, Blue Island, Cairo, Centralia, Champaign, Chicago, Chicago Heights, Danville, Decatur, Dixon, Dubuque (E), East St. Louis, Edwardsville, Elgin, Galesburg, Geneva, Glen Ellyn, Henin, Joliet, Kankakee, Lake Forest, LaSalle, Loda, Litchfield, Metropolis, Moline, Morton Grove, Mt. Carmel, Paris, Peoria, Pontiac, Quincy, Rock Island, Rockford, Springfield, Streator, Waukegan. (R. 361, 362 Ex. 3, R. 85.)

In the State of Indiana Mr. Guskey named as typical points the following:

> Aurora, Elkhart, Evansville, Fort Wayne, Indianapolis, Lafayette, Lawrenceburg, Logansport, Muncie, New Albany, South Bend, Terre Haute, East Chicago, Gary, Indiana Harbor, Hammond. (R. 361, 362, Ex. 3, R. 85.)

In Ohio Mr. Guskey testified that the points to which appellant's service has been used were:

> Canton, Cleveland, Columbus, Toledo, Cincinnati. (R. 362, Ex. 3, R. 85.)

Mr. Guskey testified that the bulk of the distillers' supplies which had been transported by applicant for his

companies consisted of glass bottles originating at Alton, Illinois, Dunkirk, Indiana, Indianapolis, Indiana, Terre Haute, Indiana, and Winchester, Indiana. (R. 198, Ex. 3, R. 85.)

Other shipper witnesses who testified concerning service which had been performed for them by appellant were:

M. F. CHANDLER, general traffic manager of Frankfort Distilleries, Inc., and Vice-President of the Kentucky Liquor Producers Traffic Association, whose members are: Brown-Forman Distillery Co., Bardstown Distilling Co., Inc., John A. Barry Distillery, Byrd Distilling Co., Calvert Distilleries Corp., Carstairs Distilleries, Cave Springs Distillery, Churchill Distilleries, Dant & Dant, Cummins Distillery, Davies County Distillery, Frankfort Distilleries, Inc., Glenmore Distilleries, Glencoe Distilling Co., Kentucky Valley Dist. Co., Labrot & Graham Distilleries, H. McKenna, Inc., Old Joe Distillery, K. Taylor Distilling Co., Old Lewis Hunter Distillery, Ripey Bros. Distillery, Joseph E. Seagram & Sons Co., Stitzel-Weller Distilleries, Wathen Distilleries, Woodford County Dist. Co., General Distillers of Kentucky. (R. 151-175, Ex. 3, R. 85.)

F. F. GILBERT, assistant traffic manager of Swift and Company and its subsidiaries. (R. 216-223, Ex. 3, R. 85.)

P. E. PERRY, general traffic manager of Kraft-Phoenix Cheese Company. (R. 223-227, Ex. 3, R. 85.)

R. C. JOHNSON, Treasurer of the Beveridge Paper Company of Indianapolis, Indiana. (R. 227-230, Ex. 3, R. 85.)

H. E. RUMRILL, traffic manager of the Standard Nut Margarine Company of Indianapolis, Indiana. (R. 231-237, Ex. 3, R. 85.)

In addition to the testimony of shippers, the appellant submitted certain documentary evidence relative to its operations on, before and after July 1, 1935, (R. 330, Ex. 3, R. 85.) but said documentary evidence was not as full and complete as that which had heretofore been submitted to appellee through its agent, the District Supervisor at Indianapolis in August, 1937, as heretofore pointed out. (R. 40, 41, 42, Ex. 1, R. 85.)

In connection with this documentary evidence of appellant's operations, there was submitted to the appellee the affidavit of its own agent, the District Supervisor heretofore referred to, showing that the documentary evidence available at the time of hearing was not as extensive as that which had been submitted to and examined by said District Supervisor, agent of the appellee, but the appellee specifically refused and failed to consider the affidavit of its own agent relative to these matters. (R. 24, Ex. 1, R. 85.)

Between the time of the taking of evidence by the appellee in September, 1938 and of the oral argument before Division 5 of the appellee on October 27, 1939, the second largest stockholder of the appellant, Mr. Sam Berman, of Logansport, Indiana, who was the owner of 390 out of a total of 1,000 shares of stock, died, and appellant felt it a duty in said oral argument to call this situation to the attention of the appellee, which was done by appellant. (R. 433, Ex. 3, R. 85.) But the appellee failed to recognize or take into consideration this fact in the order complained of, and decided the case upon the basis of the stock ownership which existed at the time of taking evidence in September, 1938, but in so doing erroneously stated the stock ownership as shown in the record before appellee, said erroneous statement being as follows:

"Another individual, also a director, who owns 49 percent of the stock, lives in the State of New York, and has not attended a meeting of applicant's board of directors for over 2 years." (R. 27, Ex. 1, R. 85.)

Although this erroneous statement was called to the attention of the appellee by the appellant, the appellee, although it has had opportunity to do so in subsequent orders, has not corrected this misstatement of the evidence in the order complained of. (R. 27, Ex. 1, R. 85.)

A certified copy of the evidence and the argument before the appellee, heretofore referred to in this memorandum, is in the record before this court. In the court below, the appellee, through its counsel, strenuously objected to the introduction of any new or additional evidence by appellant, and the only additional evidence which appellant was permitted to introduce in the court below referred to the value of the property of appellant, and the fact that the appellant would suffer irreparable injury if the order of the appellee is permitted to become effective. (R. 80-93.) This evidence showed the business of appellant to be substantial, and that its gross revenue for the first eleven months of the year 1941 amounted to $498,138.18, (R. 87, Ex. 4, R. 87.) The value of the business of the appellant was placed by one witness, the Treasurer of an Indianapolis Bank at $500,000.00, and by Mr. Ziffrin, appellant's President, at $750,000.00. (R. 89, 90, 91.)

Mr. Ziffrin testified that the effect of the order of the Interstate Commerce Commission would be totally to destroy the business and investment of the stockholders in the business of appellant. (R. 91.)

In view of the rulings of the appellee in proceedings before it, and in view of appellee's position in the court

below, and the rulings of the court below, this case now stands decided on evidence taken almost two years before the enactment of the law under which the decision was made, and the appellant has been denied any opportunity whatsoever to submit evidence as to the situation which now exists under the provisions of the new law.

## IV. SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

The appellant will urge the following assigned errors specified both in its assignment of errors and in its statement of points to be relied upon. (R. 72, 457.)

The United States District Court for the Southern District of Indiana erred:

1. In dismissing this cause for want of equity;

2. In determining and ruling, and in stating as its conclusions of law and as the basis of its judgment herein, the following:

   a. That the law is with the defendants;

   b. That there is substantial evidence to support the order of the defendant Interstate Commerce Commerce Commission; and

   c. That the complaint should be dismissed for want of equity;

3. In applying Section 210 of Part II of the Interstate Commerce Act, as amended September 18, 1940, (54 Stat. 919, 923, U. S. Code, Title 49, Sec. 310) to both a record made and facts existing prior to that date by determining and finding and stating as its special finding of fact No. VIII, and as one of the bases of its judgment herein that under Section 210 as to the relationship between Ziffrin

Truck Lines, Inc., the common carrier, and plaintiff, the record showed certain relationships.

4. In determining and finding and stating as its special finding of fact No. IX and as one of the bases of its judgment herein that there was sufficient substantial evidence presented to the Commission to sustain its conclusion and order which include findings that:

a. The holding of a permit by the plaintiff authorizing contract carrier operations would not be consistent with the public interest and with the national transportation policy;

b. That Ziffrin, Incorporated, plaintiff, was not entitled to operating rights as to territory and commodities as stated in its application to the Interstate Commerce Commission, as amended.

## V. ARGUMENT

### A. Summary of the Argument

The argument for appellant is directed to the assigned errors which are in turn directed to the conclusions of law and findings of fact of the court below.

1. In dismissing appellant's complaint for want of equity the court below sustained the validity of the order of the appellee in cause No. MC-2511 decided May 29, 1941, and in so doing erred and deprived appellant of due process of law in:

(a) Sustaining the appellee in the exercise of power not conferred on it by law.

(b) Sustaining the appellee in making an ex post facto application of 54 Stat. 919, 923, Section 210 of Part II of the Interstate Commerce Act, enacted September 18, 1940 to a record completed two years before the enactment of the statute without giving appellant an opportunity to be heard and show that it has fully complied with the provisions of said section, and

(c) Sustaining the appellee in depriving appellant of rights acquired under 49 Stat. 552, Section 209 (a) of the Motor Carrier Act of 1935 quoted in full in Appendix "B" to this brief, without proper notice and opportunity to be heard.

2. The ruling of the court below that there is substantial evidence to support the order of the defendant Interstate Commerce Commission is erroneous for the reason that said order of the Interstate Commerce Commission is based:

(1) In part upon findings made without evidence.

(2) In part upon findings made on evidence which clearly does not support them.

(3) In part upon findings predicated upon the rejection of uncontroverted evidence and

(4) In part on a record in another cause before appellee which was not made a part of the record in this cause.

All of these arbitrary acts are a denial of due process of law to appellant.

3. The court below erred in sustaining the appellee Interstate Commerce Commission in applying Section 210 of Part II of the Interstate Commerce Act, enacted September 18, 1940 to both a record made and facts existing on a date more than two years prior to the enactment of said Section 210 of Part II of the Interstate Commerce Act, and in finding certain relationships as existing between appellant and Ziffrin Truck Lines, Inc., a common carrier, under the provisions of said section.

4. (a) The court below erred in sustaining the finding of the appellee Commission that a holding of a permit by appellant would not be consistent with the public interest and the national transportation policy for the reason that said finding of appellee Commission is based upon assumptions and not upon evidential facts in the record.

(b) The court below erred in sustaining the finding of the appellee as to the territory served and the commodities transported by appellant on, before and continuously since July 1, 1935, for the reason that appellee rejected uncontroverted evidence in making its findings. In making its findings relative to the territory served by appellant on, before and continuously since July 1, 1935 the appellee determined said operating rights to be vir-

tually identical with those of Ziffrin Truck Lines, Inc., a common carrier, when the uncontroverted evidence showed that appellant operated in a much wider territory.

The appellant concludes that it has been denied due process of law for the reason that its operating rights have been restricted as a result of the rejection of uncontroverted evidence and in finding that no permit should be issued by the application of Section 210 of Part II of the Interstate Commerce Act to a record made two years before when there was no prohibition in the law against the granting of a permit to appellant, and in that appellant has not been afforded an opportunity of submitting evidence of its compliance with Section 210 of Part II of the Interstate Commerce Act effective September 18, 1940. For the above reasons the cause should be reversed and remanded to the court below for further proceedings appropriate to the order of this court.

## B. Text of Argument

The conclusions of law of the court below are most general in nature, and throw no light upon the legal questions involved in this case. In fact, the conclusions of law of the court below make no reference whatsoever to any legal propositions raised by the appellant, although these legal propositions were carefully set out in appellant's brief filed with the court below. Appellant has attempted to direct its assignment of errors to the general, vague and unsatisfactory conclusions of law made by the court below.

1. The first assigned error is that the United States District Court for the Southern District of Indiana erred in dismissing this cause for want of equity. (R. 72.) In dismissing appellant's complaint for want of equity,

the court below sustained the validity of the order of the appellee complained of.

In the order complained of, the appellee at 28 M. C. C. 695 under the caption "Applicability of Section 210 of the Act," sets out in full Section 210 of Part II of the Interstate Commerce Act as enacted September 18, 1940, 54 Stat. 919, 923, U. S. Code, Title 49, Sec. 310, and makes said section the basis of its order. The section follows:

> "Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—(1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and (2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, of any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory."

After quoting the above section of the law, the order of appellee at 28 M. C. C. 695 (R. 29, Ex. 1, R. 85) states:

> "Applicant contends that this section has no application to the facts under consideration because

(a) it and the common-carrier company are separate corporations, holding different types of State authority and rendering different services, (b) the two corporations were in existence prior to the enactment of Part II of the act, and (c) the application of the common-carrier company has been determined. Applicant also places much stress upon the fact that the section relates to the holding of dual authority by the same person and, in effect, argues that more than one person is here involved, because of the existence of the separate corporations."

There are several erroneous statements in the paragraph of the order just quoted. Appellant had not contended "that this section has no application to the facts under consideration," because at the time appellant had submitted evidence, September 12 and 13, 1938 (R. 356, Ex. 3, R. 85), had briefed the case, November 22, 1938, (R. 423) and had been heard in oral argument before the appellee October 27, 1939 (R. 422-452), the section referred to which became effective September 18, 1940 had not yet been enacted by Congress. The appellant has never been given an opportunity by the appellee to submit evidence, to file briefs or make arguments or any other contention on what its position is with regard to the provisions of said section (R. 44, Ex. 1, R. 85). As a matter of fact, both in the court below and now, the appellant freely admits that the section quoted has been applicable to appellant since its enactment, and if given an opportunity, appellant will offer evidence to show that it has fully complied with Section 210, effective September 18, 1940, quoted in the order complained of.

The evidence, the briefs and the oral argument upon which appellee based its decision were all taken and heard before September 18, 1940, when the law applied was enacted by Congress. When appellant learned through

the order complained of, which was approved May 29, 1941, that the appellee had applied to it a new law not in effect at the time of the hearing, briefing and argument, appellant promptly petitioned appellee for reconsideration and rehearing of this matter (R. 44, Ex. 1, R. 85) so that an opportunity would be afforded appellant to submit evidence as to its status under the new law, but said petition was denied. (R. 44, Ex. 1, R. 85.)

The statute as to dual control in effect on September 12 and 13, 1938, when hearing was had, (R. 132, 356, Ex. 3, R. 85) on November 22, 1938 when applicant's brief was filed, (R. 423) and on October 27, 1939 when oral argument was held and the cause was submitted to Division 5 of the Interstate Commerce Commission for decision, (R. 452, Ex. 3, R. 85) was 49 Stat. 554, the original Section 210 of the Motor Carrier Act of 1935 effective August 9, 1935, and was as follows:

> "No person, after January 1, 1936, shall at the same time hold under this part a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared in Section 202 (a) of this part."

It was and is appellant's contention that this section had no application to appellant which is one of two separate and distinct corporations which were under common management and control effectuated prior to the enactment of the Motor Carrier Act of 1935. There was no prohibition in the original Section 210 of the Motor Carrier Act of 1935, 49 Stat. 554, against the holding of a

certificate and a permit by separate and distinct corporations under common management and control effectuated prior to the passage of the Act and there was no such prohibition in any other section of the Interstate Commerce Act, but notwithstanding this fact the appellee attempted to apply to appellant provisions of Part I of the Interstate Commerce Act concerning common management and control and relating exclusively to future consolidations and mergers of rail carriers. (R. 43, Ex. 1, R. 85.) The portion of the order and notice of hearing referred to is as follows, 28 M. C. C. 692. (R. 25, Ex. 1, R. 85.)

> "Notice is hereby given that although application herein is for a certificate or permit on Form BMC 1, the applicant must establish also the corporate relationship existing between the applicant herein mentioned and the Ziffrin Truck Lines, Inc., (No. MC-2510), and if said applicant and the Ziffrin Truck Lines, Inc., are found to be affiliated within the meaning of section 5 (6), Part I, applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in section 202 (a) of the Motor Carrier Act, 1935, within the meaning and contemplation of section 210 of said Motor Carrier Act, 1935."

The appellant strenuously objected to proceeding with a hearing under nonapplicable law, Section 5 (6) of Part I quoted in full in Appendix C of this brief but as heretofore pointed out, was, nevertheless, required to proceed. (R. 250, 251, 252, Ex. 3, R. 85.) The appellee, in the order complained of, admits at 28 M. C. C. 693 that the section of Part I of the Interstate Commerce Act included in the notice and the requirements of hearing, was not applicable to appellee, in the following language:

"Applicant particularly questions the legality of any inquiry into the corporate relations between the two companies, because of the reference to section 5 (6) of Part I, of the Interstate Commerce Act, as then constituted, which, it contends, had no application whatever to motor carriers. It is true, of course, that the only provisions of part I of the act then applicable to carriers subject to regulation under part II were made so by specific reference in the latter part of the act. It is clear, however, that what is implied in the quoted portion of the notice of hearing is the question of relations between the two companies. The section of part I to which reference is made appropriately describes relations between motor-carrier corporations engaged in common-carrier and contract-carrier service between the same points or in the same territory, which would properly be subject to inquiry under section 210 of the act, relative to dual operation. The order does not require applicant to do anything under an inapplicable provision of part I. For the purpose of the inquiry the language in section 213 (b) (1) of the act as it then read might just as readily have been employed, which, except that it related to motor instead of rail carriers, contained the same language as section 5 (6) of part I, prior to an amendment of part II on June 28, 1938. Prior to such amendment the paragraph referred to provided that:

> It shall be unlawful for any person, except as provided in paragraph (a), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more motor carriers which are not also carriers by railroad, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effec-

tuated after the enactment of this part and in violation of this paragraph. As used in this paragraph, the words 'control or management' shall be construed to include the power to exercise control or management.

"The amendment added, after the phrase, 'carriers by railroad' in line 6, the following language, 'or of one or more such motor carriers and one or more carriers other than motor carriers.'" (R. 25, 26, Ex. 1, R. 85.)

It will be noted that after admitting that the section of Part I referred to in the notice was not applicable to appellant that appellee indicates that another law, section 213 (b) (1) of Part II, "might just as readily been employed." But a mere casual reading of this second statute shows that it applies only to common control and management effectuated after the passage of the Motor Carrier Act.

The amendment of Section 213 (b) (1) of Part II on June 28, 1938 and the repeal of said section and the incorporation of its provisions in Section 5 of Part I on September 18, 1940 had no effect whatever on the proposition that the section refers solely and exclusively to common control and management effectuated after the passage of the Motor Carrier Act of 1935.

In the court below and in the order complained of in what appears to be a discussion of 49 Stat. 554, the original Sec. 210 of the Motor Carrier Act of 1935, the appellee has contended that Section 210 of Part II of the Interstate Commerce Act as enacted September 18, 1940, 54 Stat. 919, 923 did not change the provisions or meaning of 49 Stat. 554, the original Section 210 of the Motor Carrier Act of 1935. In the order complained of in 28 M. C. C. at page 698 the appellee said:

"Individuals or single corporations which instituted both common-carrier and contract-carrier operations prior to the enactment of part II are not exempt from the provisions of section 210 even though the rights claimed are based on the 'grandfather' clauses of the act. See M. Moran Transp. Lines, Inc., Common Carrier Application 23 M. C. C. 139, 149. It certainly could not have been the intent of Congress to exempt from the operation of the section the individuals who were engaged in both types of operation, prior to the act, through the media of separate corporations.

"We therefore conclude that the section applies where two affiliated corporations, under common control and management, claim both common-carrier and contract-carrier operations between the same points or in the same territory." ((R. 32, Ex. 1, R. 85.)

It will be noted that the appellee attempts to discuss what was "the intent of Congress" in connection with the passage of 49 Stat. 554, the original Section 210 of the Motor Carrier Act of 1935. The legislative history of 54 Stat. 919, 923, section 210 of Part II of the Interstate Commerce Act, clearly discloses that the appellee has erroneously construed 49 Stat. 554, the original section 210 of the Motor Carrier Act of 1935 by attempting to apply it to separate persons under common control and management. The true intent of Congress in enacting Section 210 of Part II of the Interstate Commerce Act on September 18, 1940, 54 Stat. 919, 923, was to extend the provisions of said section for the first time to persons under common control, as is disclosed in the report of the Conference Committee prepared for the purpose of explaining the intent of the legislation and submitted to members of both the House and Senate before the law was passed.

Report No. 2832 of the House of Representatives of the Third Session of the 76th Congress was a conference report dealing with the Transportation Act of 1940. At Volume 86, Part 9 Congressional Record page 10169, said report explains the amendment in Section 21 (a) of Senate Bill 2009 which was the Transportation Act, as follows:

"SECTION 21 (a). DUAL OPERATIONS UNDER CERTIFICATES AND PERMITS, MOTOR CARRIERS.

"The conference substitute in section 21 (a) amends section 210 of the Interstate Commerce Act which prohibits a person from holding at the same time both a certificate as a common carrier of property by motor vehicle and a permit as a contract carrier of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that both forms of operating authority may be held consistent with the public interest and with the policy declared in part II, so that the section will apply not only to a particular motor carrier but also to any person controlling, controlled by, or under common control with, such person."

The conference report was agreed to by the House of Representatives at Volume 86, Part 9, Congressional Record, page 10194, and by the United States Senate at Volume 86, Part 11, Congressional Record, page 11766.

From the language of 54 Stat. 919, 923, Section 210, enacted September 18, 1940, and from the language of the conference committee report of Congress, it is very apparent that the holding of a certificate and permit by separate corporations under common management and control effectuated prior to the passage of the Motor Carrier Act of 1935 was not prohibited by statute prior to September 18, 1940.

The court below dismissed the cause for want of equity, and thereby affirmed the validity of order No. MC 2511 of the appellee approved May 29, 1941 (R. 66), and in so doing erred and deprived appellant of due process of law in:

(a) Sustaining the appellee in the exercise of a power not conferred on it by law,

(b) Sustaining the appellee in making an ex post facto application of 54 Stat. 919, 923, Section 210 of Part II of the Interstate Commerce Act enacted September 18, 1940, to a record completed two years before the enactment of the statute, and

(c) Sustaining the appellee in depriving appellant of rights acquired under 49 Stat. 552, Section 209a of the Motor Carrier Act of 1935, quoted in full in appendix B to this brief, without proper notice and an opportunity to be heard.

(a) An act or an order of an administrative body, though couched in a form which superficially considered might appear to be the exercise of authority conferred on it, should be set aside by the courts if it is based on an assumption of power not conferred by law.

In *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 52 Sup. Ct. Rep. 146, 55 L. Ed. 283, this Court in 1911, speaking through Chief Justice White, at 55 L. Ed., pages 286 and 287, said:

> "In other words, the contention is, that although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority,

but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power. Applying these propositions, the insistence is that, both in form and in substance, the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which, in and of itself in a legal sense, might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so, or because a railroad had so conducted itself as to be stopped in the future from being entitled to receive a just and reasonable compensation for the service rendered. On the other hand, the Commission, in the argument at bar, does not contend that it possessed the indeed abnormal and extraordinary power which the railroads thus say were exerted in rendering the order complained of,—a power which, if it obtained, would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads, and would in effect assert public ownership without any of the responsibility which ownership would imply. While it is not denied on behalf of the Commission that that body may have considered the prior rate prevailing in the Willia-

mette valley, the period during which it had been in force, and e effect upon the business situation in the valley of a change to a higher charge, all these things, it is insisted, were not made the basis of the power exerted, but were simply taken into consideration as some of the elements proper to be considered in the ultimate exertion of the lawful power to forbid an unjust and unreasonable rate and fix a reasonable one.

"It is clear, therefore, as we have said at the outset, that the result of the contentions and concessions of the respective parties is to reduce the controversy to a single issue, which is: What was the nature and character of the order made by the Commission? That is: What, in substance, was the power which the Commission exerted in making the order?

"Coming to the consideration of that subject, we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

In *Garfield v. United States ex rel. Goldsby*, 211 U. S. 249, 29 Sup. Ct. Rep. 62, 53 L. Ed. 168, the Secretary of the Interior, charged with handling of Indian lands, struck without notice the name of an Indian from the rolls of those entitled to hold land, thereby assuming an arbitrary power which was not conferred upon him by law, and the court held that the right to be heard before property is taken or rights and privileges withdrawn which have been previously legally awarded is the essence of due process of law.

On June 23, 1938, the Commission issued its notice setting Cause No. MC 2511 for public hearing and requir-

ing appellant to establish its corporate relationship with Ziffrin Truck Lines, Inc., a common carrier, under a section of Part I of the Interstate Commerce Act (R. 43, Ex. 1, R. 85), which was not applicable and when there was no section of the Motor Carrier Act authorizing the Commission to examine into the corporate relationship of separate corporations which had not effectuated or proposed to effectuate a consolidation or other corporate relationship since the effective date of the Motor Carrier Act. Both of the above actions by the Interstate Commerce Commission assumed power in the Commission which was not conferred upon it by law, and were denials of due process of law to appellant.

(b) A statute comes within the constitutional prohibition of ex post facto law, which by its necessary operation and in relation to the offense, or its consequences, alters the situation of the accused to his disadvantage, and the application of a statute may be ex post facto as to offenses already consummated although the statute is lawful as to future offenses.

In *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648, decided in 1798, the Supreme Court of the United States, speaking through Justice Paterson, said at 1 L. Ed., page 652:

> "The words, ex post facto, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains and penalties. Judge Blackstone's description of the terms is clear and accurate. There is, says he, a still more unreasonable method than this, which is called making laws ex post facto, when after an action, indifferent in itself, is committed, the Legislator, then for the first time, declares it to have been a crime, and inflicts a punishment upon the person who committed it. Here it is impossible, that the party could foresee that an action, innocent when it was done, should be afterward converted to

guilt by a subsequent law; he had therefore, no cause to abstain from it; and all punishment for not abstaining, must of consequence, be cruel and unjust."

In *Lindsey v. Washington,* 301 U. S. 397, 57 Sup. Ct. 797, 81 L. Ed. 1182, considering a change in indeterminate sentences and paroles after the commission of the offense but before sentence, the Supreme Court of the United States in 1937, speaking through Mr. Justice Stone, at 81 L. Ed. 1186, said:

> "But the ex post facto clause looks to the standard of punishment prescribed by a statute rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. King v. Missouri, supra (107 U. S. 228, 229, 27 L. Ed. 508, 509, 2 S. Ct. 443); Re Medley, 134 U. S. 160, 171, 33 L. Ed. 835, 840, 10 S. Ct. 384; Thompson v. Utah, 170 U. S. 343, 351, 42 L. Ed. 1061, 1066, 18 S. Ct. 620."

In *Thompson v. Utah,* 170 U. S. 343, 18 Sup. Ct. Rep. 620, 42 L. Ed. 1061, the United States Supreme Court considered a grand larceny committed while Utah was a territory, requiring twelve jurors, the accused was tried and convicted by eight jurors after Utah became a state. This Court in 1898, speaking through Mr. Justice Harlan at 42 L. Ed., page 1068, said:

> "If one under trial for a felony, the punishment of which is confinement in a penitentiary, could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt.
>
> "In our opinion the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by jury of

eight persons, is ex post facto in its application to felonies committed before the territory became a state, because in respect to such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."

Section 210 of Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 310), effective September 18, 1940, for the first time made it unlawful for separate corporations under common management or control to hold a certificate and a permit, and that statute became effective after the hearing had been held, the record made, briefs filed, oral arguments held, and this cause submitted to the appellee for decision. There is nothing in the record before the appellee in this cause in any way reflecting conditions subsequent to the effective date of said Section 210, as amended September 18, 1940, and opportunity has been denied to appellant to show the Commission what it has done or what it is willing to do to comply with that statute. (R. 44, Ex. 1, R. 85.)

The effect of the Commission's order of May 29, 1941, was to penalize appellant to the full value of its property under a statute effective September 18, 1940, for a corporate relationship effectuated prior to the enactment of the Motor Carrier Act of 1935, and lawful when effectuated and lawful until September 18, 1940, without giving appellant any opportunity to comply with the new statute or to make any showings under it.

The actions of the Commission in denying appellant's petition filed June 25, 1941, for reconsideration and rehearing (R. 44, Ex. 1, R. 85) and deciding the cause under a statute not in effect during the period covered by

the record, were arbitrary, were of ex post facto application, and a denial of due process of law to appellant.

In this connection we desire to point out that the statute effective September 18, 1940, (R. 28, Ex. 1, R. 85) does not prohibit the appellee from granting certificates or permits, but simply prohibits corporations under common management or control from holding both a certificate and a permit unless the Commission finds that such holding is consistent with the public interest. It would seem under the circumstances of this case as was suggested by Commissioner Lee in his dissenting opinion to the appellee's order 28 M. C. C. 699, (R. 34, Ex. 1, R. 85) that the reasonable and equitable procedure would have been for the appellee to grant a permit having a scope as to territory and commodities conforming to the evidence in the record, but to make the issuance of the permit effective upon the appellant, showing to the appellee that it had complied with the provisions of the statute effective September 18, 1940.

(c) Parties whose rights are to be affected are entitled to be heard, and one who has acquired rights by an administrative proceeding can not be deprived of them without notice and an opportunity to be heard, and it is no answer for failure to give proper notice to assert that due process of law would have led to the same result as there was no adequate defense on the merits.

In *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531, decided January 18, 1864, the United States Supreme Court, speaking through Justice Clifford, at 17 L. Ed., page 534, said:

> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person

or property without notice and an opportunity to make his defense."

In *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 Sup. Ct. 206, 83 L. Ed. 126, decided December 5, 1938, the Supreme Court of the United States, speaking through Chief Justice Hughes, said at 83 L. Ed., page 142:

> "We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. Russell v. Clark, 7 Cranch, 69, 96, 3 L. Ed. 271, 280; Mallow v. Hinde, 12 Wheat 193, 198, 6 L. Ed. 599, 600; Minnesota v. Northern Securities Co., 184 U. S. 199, 235, 46 L. Ed. 499, 515, 22 S. Ct. 308; Garzot v. Rios de Rubio, 209 U. S. 283, 297, 52 L. Ed. 794, 800, 28 S. Ct. 548; General Invest. Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261, 285, 67 L. Ed. 244, 258, 43 S. Ct. 106. The rule, which was applied in the cases cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here. See Mallow v. Hinde, 12 Wheat 193, 6 L. Ed. 593 supra."

In *Garfield v. United States ex rel. Goldsby*, 211 U. S. 249, 29 Sup. Ct. R. 62, 53 L. Ed. 168, in a case in which the Secretary of the Interior struck without notice the name of an Indian from the rolls of those entitled to hold land, the Supreme Court of the United States, speaking through Justice Day, at 53 L. Ed., pages 174 and 175, said:

> "In our view, this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the Acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment inter-

ferring with the Secretary when he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

"In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

"The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

In *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 35 Sup. Ct. Rep. 625, 59 L. Ed. 1027, decided May 3, 1915, the Supreme Court of the United States, speaking through Justice Pitney, at 59 L. Ed., page 1032, said:

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense in the merits. Rees v. Watertown, 19 Wall 107, 123, 22 L. Ed. 72, 77.

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for due process of law that the Constitution requires."

The appellant, prior to June 4, 1938, had complied fully with all applicable sections of the Motor Carrier Act of 1935 and with a compliance order issued by the Interstate Commerce Commission on May 12, 1938, and with the terms under the agreement entered into between the appellant and a District Supervisor of the Interstate Commerce Commission (R. 144, 145, Ex. 3, R. 85), and under Section 209 (a) of the Motor Carrier Act of 1935, quoted in the appendix to this brief, was entitled to a permit without further proceedings.

On June 4, 1938, the appellee issued an order which vacated the compliance order of March 12, 1938 (R. 42, Ex. 1, R. 85), without any notice or opportunity to appellant to be heard. This was a denial of due process of law in that it was the arbitrary exercise of a power by the appellee which was not conferred upon it by the statute. Said order of June 4, 1938, adversely affected the property and rights of appellant which had fully complied with all applicable statutory provisions and had restricted its operations to those authorized by the agreement with the District Supervisor and by said compliance order. (R. 144, 145, Ex. 3, R. 85.)

The order of the appellee dated June 23, 1938, setting Cause No. MC 2511 for public hearing, contained a notice that applicant must establish the corporate relationship existing between it and Ziffrin Truck Lines, Inc., a common carrier, which received no notice whatever of said proceeding, and that if they are found to be affiliated within the meaning of Section 5 (6) of Part I of the Motor Carrier Act of 1935, then applicant must also establish that a permit may be held by applicant consistently with the public interest and with the policy declared in Section 202 (a) of the Act within the meaning of Section 210 of said Act. (R. 43, Ex. 1, R. 85.)

Said notice was misleading and fatally defective for the reason that said Section 5 (6) of Part I of said Act was not applicable to motor carriers and at that time there was no statute which prohibited the holding of a certificate and a permit by separate corporations under a common control effectuated prior to 1935. At the hearing of the cause, however, under the defective notice and over the objection of appellant it was required to submit the proof upon which said order of May 29, 1941, the order complained of in this cause was based. The action of said appellee in issuing the defective notice assumed a power not conferred upon it by law, and the Acts of said appellee in requiring appellant over its objection to proceed under the defective notice and in denying completely all rights of the appellant on the basis of evidence taken under those conditions were all arbitrary acts and a denial of due process of law to the appellant.

The Commission order of May 29, 1941, admits that the provision of Part I quoted in the notice was not applicable (28 M. C. C. 693) (R. 25, 26, Ex. 1, R. 85), but says that Section 213 (b) (1) as it then read might just as readily have been employed. However, said Section 213 (b) (1), quoted at 28 M. C. C. 693, (R. 26, Ex. 1, R. 85) applies only to consolidations of motor carriers effectuated or proposed subsequent to the passage of the act, and no such consolidation at any time was proposed between appellant and Ziffrin Truck Lines, Inc., and that statute was not applicable. Even if it could be so construed under the decision of Coe v. Armour Fertilizer Works, quoted above, it is no answer in a due process case to say that a proper notice would have led to the same result. The notice issued and the proceedings had under the defective notice in their entirety were a denial of due process of law to the appellant.

2. The second assigned error is that the United States District Court for the Southern District of Indiana erred in determining and ruling and in stating as its conclusions of law and as the basis of its judgment herein the following:

a. That the law is with the defendants;

b. That there is substantial evidence to support the order of the defendant Interstate Commerce Commission; and

c. That the complaint should be dismissed for want of equity.

We have already covered (a) That the law is with the defendants, and (c) that the complaint should be dismissed for want of equity, by a discussion of the law applicable in that portion of our argument devoted to the first assigned error, and further discussion of these two propositions will not be made here.

(b) The ruling of the court below that there is substantial evidence to support the order of the defendant Interstate Commerce Commission is erroneous for the reason that said order of the Interstate Commerce Commission is based:

(1) In part on findings made without evidence,

(2) In part upon findings made upon evidence which clearly does not support them,

(3) In part upon findings predicated upon the rejection of uncontroverted evidence, and

(4) In part on a record in another cause before appellee which was not made a part of the record in this cause.

All of these arbitrary acts are a denial of due process of law to appellant.

(1) The appellee in its discussion supporting its finding that the holding of a permit by appellant and a certificate by Ziffrin Truck Lines, Inc., would not be consistent with the public interest, in 28 M. C. C. at 698 states:

> "The discrimination which the section is intended to obviate is always present when the same persons are able to offer both kinds of service in respect to the same commodities and between the same points." (R. 32, Ex. 1, R. 85.)

There is no evidence in the record showing that any kind of discrimination had been practiced by appellant or Ziffrin Truck Lines, Inc., in connection with their operations as motor carriers in interstate commerce. Furthermore, and particularly, there was no evidence in the record in this cause showing that "the discrimination which the section intended to obviate" was present in this case or that such discrimination "is always present."

The finding of appellee at 28 M. C. C., page 699, (R. 33, 34, Ex. 1, R. 85) that the holding of a permit by appellant and a certificate by Ziffrin Truck Lines, Inc., would not be consistent with the public interest is based upon the above assumption by the appellee of circumstances which might occur and not upon any evidence whatsoever in the record of any act of discrimination having occurred.

(2) The appellee in 28 M. C. C. at 694, in discussing the evidence in the record relating to the stock ownership of appellant states:

> "Another individual, also a director, who owns 49% of the stock, lives in the State of New York and has not attended a meeting of applicant's Board

of Directors for over two years." (R. 27, Ex. 1, R. 85.)

The quoted statement is absolutely erroneous. The stock ownership of appellant at the time of the hearing before appellee September 12 and 13, 1938, was clearly and definitely shown in the record before the appellee to be:

| | |
|---|---|
| Sam Ziffrin, Indianapolis, Indiana .... | 495 shares |
| S. O. Berman, Logansport, Indiana.. | 390 shares |
| L. Berger, Averne, New York ..... | 100 shares |
| Rose Levy, (Sister of Mr. Ziffrin) ..... | 15 shares |
| Total ..... | 1,000 shares |

(R. 258, 297, 298, Ex. 3, R. 85)

"Another individual" referred to by the appellee is Mr. L. Berger of Averne, New York, who, instead of owning 49% of the stock of appellant at the time of hearing, owned 10% of the stock of the appellant at the time of hearing. (R. 297, Ex. 3, R. 85.)

It will be noted that the appellee stated that Mr. Berger owned 39% more of the stock of appellant than he actually owned at the time of the hearing, said 39% of the stock, being the 390 shares owned at the time of hearing by Mr. S. O. Berman of Logansport, Indiana, a director of appellant. The evidence showed that Mr. Berman had attended a meeting of the Board of Directors of appellant the day before said hearing began before the appellee. (R. 298, Ex. 3, R. 85.)

This absolutely erroneous statement of important evidence in this case was called to the attention of the appellee by the appellant in its petition for reconsideration and rehearing of the order complained of but the appellee denied said petition and has made no change whatsoever in its order to reflect the true and uncontroverted evidence in the record relating to the stock ownership of appellant at the time of the hearing on September 12 and 13, 1938. (R. 44, Ex. 1, R. 85.)

At the oral argument before appellee on October 27, 1939, appellant called attention to the fact that Mr. Berman of Logansport, Indiana, had died after the date of the hearing before appellee on September 12 and 13, 1938. In denying appellant's petition for rehearing, the appellee has denied appellant an opportunity to show by evidence the present owners of the stock previously held by Mr. Berman. (R. 433, Ex. 3, R. 85.)

(3) In making findings at 28 M. C. C. 699 (R. 33, Ex. 1, (R. 85) relative to the territory in which appellant was operating on July 1, 1935, and continuously since, and as to the commodities which appellant has been transporting in interstate and foreign commerce on July 1, 1935, and continuously since, the appellee rejected uncontroverted evidence in the record.

The appellee rejected the uncontroverted testimony of Mr. B. M. Angell, Indianapolis, Indiana, general traffic manager of Stokely Brothers and Company and Van Camps, Incorporated, as to the territory in which appellant had transported canned fruits and vegetables for said companies on, before and continuously since July 1, 1935. (R. 243-247, Ex. 3, R. 85.) The testimony of Mr. Angell relative to this transportation has been digested under III, Statement of the Case, at pages 17-19 of this brief.

This evidence is that applicant since prior to July 1, 1935, has transported canned fruits and vegetables for the companies represented by Mr. Angell throughout the territory included in appellant's application before appellee, as amended, and particularly to all points and places of 5,000 population and more in said territory. (R. 244, Ex. 3, R. 85.)

In spite of this testimony which was uncontradicted, the appellee in 28 M. C. C. at 699 (R. 33, Ex. 1, R. 85) in its finding relative to the transportation which appellant was performing on July 1, 1935, and continuously since, finds that appellant had transported canned and preserved food products from Indianapolis as the only point of origin to Cincinnati, Ohio, and Chicago, Illinois, as the only points of destination. (R. 33, Ex. 1, R. 85.) In making this finding, the appellee rejected the uncontradicted sworn testimony of Mr. Angell. (R. 243-247, Ex. 3, R. 85.) The integrity of his companies which are nationally known and the integrity of the witness are unquestioned.

In connection with the transportation of alcoholic liquors, the appellant, at the hearing before the appellee, submitted the testimony of representatives of most of the large distilleries in the United States. (R. 151, 175, 192, Ex. 3, R. 85.) In this connection it should be noted that the appellant began the transportation of alcoholic liquors at the specific request of a group of large liquor producers because of chaotic conditions existing in connection with the transportation of alcoholic liquors following repeal of the 18th Amendment. (R. 148, 149, Ex. 3, R. 85.)

The appellee rejected the uncontroverted testimony of Mr. Frank H. Luther, general traffic manager of Joseph E. Seagram and Sons, and many allied and affiliated companies as to the territory in which appellant had trans-

ported alcoholic liquors for said companies on, before and continuously since July 1, 1935. (R. 175, 192, Ex. 3, R. 85.) The testimony of Mr. Luther relative to this transportation has been digested under III, Statement of the Case, at pages 19-20 of this brief.

This evidence is that appellant since prior to July 1, 1935, has transported alcoholic liquors for the companies represented by Mr. Luther throughout the territory included in appellant's application before appellee, as amended. (R. 177, Ex. 3, R. 85.) The only reservation in the testimony of Mr. Luther as to the service of appellant throughout the territory involved was as to the States of Ohio and Pennsylvania, (R. 176, Ex. 3, R. 85) where by reason of a state monopoly of the sale of alcoholic liquors, the destinations served by appellant on, before and continuously since July 1, 1935, were specific points in those states which were named by Mr. Luther and set out in the digest of his testimony at pages 19-20 of this brief.

The appellee rejected the uncontroverted testimony of Mr. Edward Guskey, general traffic manager of Schenley Distilleries, Incorporated, and many allied and affiliated companies as to the territory in which appellant had transported alcoholic liquors and distillers' supplies for said companies on, before and continuously since July 1, 1935. (R. 196, 197, Ex. 3, R. 85.) The testimony of Mr. Guskey relative to this transportation has been digested under III, Statement of the Case, at pages 20-21-22 of this brief.

This evidence is that appellant since prior to July 1, 1935, has transported alcoholic liquors and distillers' supplies for the companies represented by Mr. Guskey throughout the territory included in appellant's applica-

tion before appellee, as amended. (R. 196, 197, Ex. 3, R. 85.) The only reservation in the testimony of Mr. Guskey as to the service of appellant throughout the territory involved was as to the States of Ohio and Pennsylvania (R. 200, Ex. 3, R. 85), where by reason of a state monopoly of the sale of alcoholic liquors, the destinations served by appellant on, before and continuously since July 1, 1935, were specific points in those states which were named by Mr. Guskey (R. 362, Ex. 3, R. 85) and set out in the digest of his testimony at page 20 of this brief.

In restricting appellant to the territory and commodities set out in its finding, 28 M. C. C. 699, (R. 33, Ex. 1, R. 85) the appellee rejected the uncontroverted evidence of shipper witnesses concerning transportation service which appellant had performed in interstate commerce on, before and continuously since July 1, 1935. The rejection of this uncontroverted evidence by appellee was an arbitrary act and a denial of due process of law to appellant.

(4) The appellee, as indicated by its discussion in the order complained of, 28 M. C. C. 694, (R. 27, Ex. 1, R. 85) has based its findings in part upon a record made and evidence taken in its docket No. MC 2510 which was the Ziffrin Truck Lines, Inc., Common Carrier Application, 6 M. C. C. 722. (R. 27, Ex. 1, R. 85.) The appellant was not a party to the proceedings in MC 2510 and had no opportunity to cross-examine the witnesses in that proceeding, but the appellee in the order complained of, 28 M. C. C. at 694, states:

> "In the report and order dealing with the application of the common-carrier company, to which appropriate reference has been made in the record in this proceeding, it was found that the president thereof was also president of the applicant herein

> and that certain of the vehicles used in the service of both the common-carrier company and applicant herein bore the names of both carriers, and were registered in the names of both companies. At least one of the drivers who testified in that proceeding was unable to state definitely which company employed him in or about the statutory date, and one other driver had occasionally hauled for the applicant herein and had considered the president of the two concerns as his employer." (R. 27, Ex. 1, R. 85.)

At the hearing of appellant's application on September 12 and 13, 1938, the examiner representing the appellee and conducting the hearing for appellee, stated at page 264 of the record before the appellee (R. 306, Ex. 3, R. 85) that "I would say that in view of the issue raised by the orders that all due and proper consideration will be given to the proceeding in M. C. 2510." This is the "appropriate reference" mentioned in the order complained of at 28 M. C. C. 694 (R. 27, Ex. 1, R. 85). It is obvious and apparent from the discussion contained in the order of appellee which is quoted that the appellee did give consideration to the record in M. C. 2510 in deciding appellant's case, without introducing that record in evidence or giving appellant any opportunity to cross examine the witnesses who testified in that case, a case of which appellant had no notice and in which appellant did not participate.

An order based upon findings made without evidence or upon evidence which clearly does not support them, or upon rejection of uncontroverted evidence or upon evidence not in the record is an arbitrary act and a denial of due process of law.

In *Northern Pacific Railway Company v. Department of Public Works* (1925), 268 U. S. 38, 45, 69 L. Ed. 836, the United States Supreme Court, speaking through Justice Brandeis, said at 69 L. Ed. 841:

> "The mere admission by an administrative tribunal of *matter* which, under the rules of evidence applicable to judicial proceedings, would be deemed incompetent, or mere error in reasoning upon evidence introduced, does not invalidate an order. • • • An order based upon a finding made without evidence (Chicago Junction Case (Baltimore and O. R. Co. v. United States), 264 U. S. 258, 263, 68 L. Ed. 667, 673, 44 Sup. Ct. Rep. 317), or upon a finding made upon evidence which clearly does not support it (Interstate Commerce Commission v. U. P. R. Co., 222 U. S. 541, 547, 56 L. Ed. 308, 311, 32 Sup. Ct. Rep. 108) is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process."

In the Chicago Junction case (1924) *Baltimore & O. R. Co. v. United States*, 264 U. S. 258, 44 Sup. Ct. Rep. 317, 68 L. Ed. 667 at page 674, the Supreme Court of the United States, speaking through Justice Brandeis, said:

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs."

In *Railroad Commission v. Pacific Gas & Electric Co.* (1938), 302 U. S. 388, 58 Sup. Ct. Rep. 334, 82 L. Ed. 319, at page 322, the Supreme Court of the United States, speaking through Chief Justice Hughes, said:

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. Ohio Bell Teleph. Co. v. Public Utilities Commission, 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 1101, 1102, 57

S. Ct. 724. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily."

In 1913, the United States Supreme Court, speaking through Justice Lamar in *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U. S. 88, 33 Sup. Ct. Rep. 135, 57 L. Ed. 431, said at 57 L. Ed. 433:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depend on facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however, beneficiently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the constitution's condemnation of all arbitrary exercise of power."

The rejection of uncontroverted evidence as a denial of due process of law was discussed by the United States Supreme Court in the case of *Ohio Utilities Co. v. Public Utilities Commission*, 267 U. S. 359, 69 L. Ed. 657. In that case decided in 1925, in an opinion by Justice Sutherland, the rejection of certain uncontroverted evidence as to value by the Ohio Public Utilities Commission and the affirmance of its order by the State Supreme Court was held to be a denial of the due process to which the utility was entitled. At 69 L. Ed. page 659, the court used the following language:

"There was no testimony to the contrary; and the company, in view of the concession, evidently deemed it unnecessary to produce evidence upon the point. That such expenditures in a substantial amount would necessarily be made in reproducing the utility is clear; it is not suggested that the estimate of the engineers is excessive or unfairly made; and the rejection of the entire amount cannot be regarded as otherwise than arbitrary. * * * The Commission found, it is true, that the plant had been inefficiently operated. But we find no evidence to this effect in the record, and none has been called to our attention. To the contrary, the commission's engineer, who examined the property and accounts of the company, testified that he considered the expenditures of the company were reasonable, and that the plant was efficiently and economically managed. * * * From the foregoing, it is evident that the state supreme court did not accord to the plaintiff in error that sort of judicial inquiry to which, under the decisions of this court, it was entitled."

The Examiner of the appellee stated during the hearing in Cause MC 2511 that all due and proper consideration would be given in MC 2511 to the proceeding in MC 2510 which was Ziffrin Truck Lines, Inc., Common Carrier Application. (R. 306, Ex. 3, R. 85.) The record in MC 2510 was not in evidence in Cause No. MC 2511, but is discussed and made the basis of a part of appellee's findings in the case at bar. Such a decision based on evidential facts not spread of record is a denial of due process of law, as was clearly held by the United States Supreme Court in 1937 in an opinion by Justice Cardozo, in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 57 Sup. Ct. Rep. 724, 81 L. Ed. 1093. In that case, in which trends in value were taken from trade magazines not in evidence, the court said at 81 L. Ed. 1099:

"Upon the strength of these unknown documents, refunds have been ordered for sums amounting into millions. This is not the fair hearing essential to due process. It is condemnation without trial."

The record before the appellee shows that appellant renders a specialized service which can not be rendered by a common carrier, such as Ziffrin Truck Lines, Inc. (R. 265, Ex. 3, R. 85.) It serves only those with whom it has contracts, maintains an efficient police and guard system, and can in emergencies throw its entire fleet into the service of one contracting party to meet its needs. (R. 264, 265, Ex. 3, R. 85.) The interchange of vehicles between these corporations and in fact with other carriers, also tends to the efficient and economic operation of the carriers, reduces the number of trucks on the highways, and is beneficial rather than harmful to the interest of the public. (R. 327, Ex. 3, R. 85.)

There is nothing in the record to show that either appellant, the contract carrier, or Ziffrin Truck Lines, Inc., the common carrier, have in any way received any advantage over any competitor by reason of their being under common control, and the finding of the appellee that a permit could not be held by appellant consistently with the public interest and the National Transportation Policy is not sustained by any substantial evidence in the record, is contrary to the uncontroverted facts in the record, is arbitrary, and a denial of due process of law.

3. The third assigned error is that the United States District Court for the Southern District of Indiana erred in applying Section 210 of Part II of the Interstate Commerce Act, as amended September 18, 1940 (54 Stat. 919, 923, U. S. Code, Title 49, Sec. 310), to both a record made and facts existing prior to that date by determining and finding and stating as its special finding of fact No. VIII

(Appendix A of this brief), and as one of the bases of its judgment herein that under said Section 210 as to the relationship between Ziffrin Truck Lines, Inc., the common carrier, and plaintiff, the record showed certain relationships.

This proposition has been fully discussed in that portion of our argument in connection with the application of Section 210 of Part II of the Interstate Commerce Act, as amended September 18, 1940, 54 Stat. 919, 923 U. S. Code, Title 49, Section 310, by the appellee. Appellant points out, however, that the court below made the same error in connection with its special finding of fact No. VIII (Appendix A of this brief) as that which was made by the appellee in applying section 210 of Part II of the Interstate Commerce Act enacted September 18, 1940, to both a record made and facts existing on a date more than two years prior to the enactment of said Section 210 of Part II of the Interstate Commerce Act, and in finding certain relationships as existing between appellant and Ziffrin Truck Lines, Inc., the common carrier, under the provisions of said section.

4. The fourth assigned error is that the United States District Court for the Southern District of Indiana erred in determining and finding and stating as its special finding of fact No. IX and as one of the bases of its judgment herein that there was sufficient substantial evidence presented to the appellee to sustain its conclusion and order which include findings that:

(a) The holding of a permit by the plaintiff authorizing contract carrier operations would not be consistent with the public interest and with the national transportation policy;

(b) That Ziffrin, Incorporated, plaintiff, was not en-

titled to operating rights as to territory and commodities as stated in its application to the Interstate Commerce Commission, as amended.

(a) The proposition that the Commission erred in finding that the holding of a permit by appellant would not be consistent with the public interest and the national transportation policy has been discussed in our argument in connection with the second assigned error and will not be repeated here. The court below erred in the same particulars as the appellee in that it affirmed the validity of the order of the appellee containing the erroneous findings heretofore discussed.

(b) In connection with our argument under the second assigned error and included in our discussion of the conclusions of law of the court below that there is substantial evidence to support the order of the appellee, we pointed out how the appellee rejected uncontroverted evidence concerning operating rights both as to territory and commodities to which appellant is entitled under the law.

It would appear at first blush that any discussion of the erroneous findings of the appellee relative to appellant's operating rights amounts to a discussion of a moot question in view of appellee's other finding that no permit should be issued to appellant because of alleged conflict with the provisions of Section 210 of Part II of the Interstate Commerce Act, enacted September 18, 1940, (28 M. C. C. 699) (R. 33, 34, Ex. 1, R. 85). However, when viewed in the light of appellee's rejection of uncontroverted evidence indicating that appellant is entitled to greater operating rights both as to commodities and territory than those included in the order complained of, it becomes apparent that there may have been an intent on the part of ap-

pellee to restrict the finding relative to appellant's operating rights to the territory for which appellee had already issued a certificate to Ziffrin Truck Lines, Inc., the common carrier in Cause No. MC 2510. The obvious reason for such restriction of the finding relative to the operating rights of appellant is found in the language of Section 210 of the Interstate Commerce Act, effective September 18, 1940, which has been set out in full at 28 M. C. C. 695, (R. 28, Ex. 1, R. 85).

In order to apply said section to appellant, not only was it necessary to find that appellant and Ziffrin Truck Lines, Inc., the common carrier, are under common control and management, but also it was necessary to find that appellant and Ziffrin Truck Lines, Inc., operate "over the same route or within the same territory."

An examination of the authority granted Ziffrin Truck Lines, Inc., by the appellee in 6 M. C. C. 722 will disclose that it is almost identical with the operating territory which appellee found appellant was entitled to in the order complained of. The evidence of record is that the appellant, while operating over irregular routes, reaches most of the points covered by the regular route operations granted by appellee to Ziffrin Truck Lines, Inc. But the uncontroverted evidence of record, which was rejected by appellee, is that appellant also operates and was operating on July 1, 1935, in a territory vastly exceeding that in which the common carrier company Ziffrin Truck Lines, Inc., was authorized to operate by appellee.

In the order complained of, 28 M. C. C. 698, the appellee, in comparing the operating authority to which appellee finds appellant is entitled, with the operating authority which appellee had already granted to Ziffrin

Truck Lines, Inc., the common carrier, makes the following statement:

> "Only two points, Aurora and South Bend, which are not included in the authority granted the common carrier company, are included in the operations which the record shows applicant has been engaged in continuously as a contract carrier." (R. 33, Ex. 1, R. 85.)

The authority granted Ziffrin Truck Lines, Inc., by appellee for the State of Ohio is restricted principally to Cincinnati, Ohio, and a few other points near the Indiana-Ohio State Line, 6 M. C. C. 736, 737. (R. 34, 35, Ex. 1, R. 85.) But the uncontradicted evidence of record as to appellant which was rejected by appellee shows that appellant operated to all points and places in the State of Ohio. (R. 243, 244, Ex. 3, R. 85.) The certificate granted Ziffrin Truck Lines, Inc., by appellee includes no right to operate anywhere in or anywhere near the State of Pennsylvania, 6 M. C. C. 736, 737, (R. 34, 35, Ex. 1, R. 85) but the uncontroverted evidence of record shows that appellant operates and was operating on July 1, 1935, to Pittsburgh, Pennsylvania, Schenley, Pennsylvania, and other points and places in the State of Pennsylvania in that area. (R. 176, 197, 200, Ex. 3, R. 85.)

The certificate granted Ziffrin Truck Lines, Inc., by the appellee includes Peoria and Chicago, Illinois, and some points near the Chicago area, 6 M. C. C. 736, 737 (R. 34, 35, Ex. 1, R. 85) but the uncontroverted evidence of record shows that the appellant operates and was operating on July 1, 1935, to points and places throughout the State of Illinois. (R. 243, 244, 361, 362, Ex. 3, R. 85.)

The certificate granted Ziffrin Truck Lines, Inc., by the appellee grants authority to serve Louisville, Kentucky, and the border cities of Newport and Covington, Ken-

tucky, near Cincinnati, Ohio, 6 M. C. C. 736, 737 (R. 34, 35, Ex. 1, R. 85) but the uncontroverted evidence of record shows that appellant is operating and was operating on July 1, 1935, to all points and places within a radius of 150 miles of Louisville, Kentucky. (R. 243, 244, Ex. 3, R. 85.)

The certificate granted to Ziffrin Truck Lines, Inc., by appellee does not include any authority to serve St. Louis, Missouri, 6 M. C. C. 736, 737 (R. 34, 35, Ex. 1, R. 85) but the uncontroverted evidence of record shows that appellant has served St. Louis, Missouri, on, before and continuously since July 1, 1935. (R. 362, 194, 197, Ex. 3, R. 85.)

The certificate granted Ziffrin Truck Lines, Inc., includes no authority to serve any point in the State of Wisconsin, 6 M. C. C. 736, 737 (R. 34, 35, Ex. 1, R. 85) but the uncontroverted evidence of record shows that appellant has served Milwaukee, Wisconsin, and points intermediate between Milwaukee, Wisconsin, and Chicago, Illinois, in the State of Wisconsin on, before and continuously since July 1, 1935. (R. 176, 177, Ex. 3, R. 85.)

In United States of America and Interstate Commerce Commission v. Carolina Freight Carriers Corporation, 62 Sup. Ct. Rep. 722, 86 L. Ed. 627, this court in an opinion delivered by Mr. Justice Douglas, sustains the power of the Interstate Commerce Commission to place restrictions on the geographic scope of the truck operations of an applicant under the "grandfather" clause of the Motor Carrier Act of 1935, but indicated clearly that the exercise of this restrictive power must be based upon the evidence before the Commission. The opinion points out that in some instances the "ability to render the service throughout the wide regions of the territory which the applicant professed to be willing to serve may not have

existed," but in the case at bar not only did the record before the appellee show ability on the part of the appellant to render service throughout the territory involved, but there was the uncontradicted evidence of responsible shippers that the service had actually been performed on, before and continuously since July 1, 1935.

In further discussing the power of the Commission to restrict the geographic scope of truck operations, the court made it clear that the Commission has no right to restrict the territory for reasons other than lack of substantial evidence.

In this connection the opinion says:

> "This does not mean that the right to the statutory grant may be withheld or cut down because the Commission disapproves of the competitive conditions which may be in existence if the authority is granted."

In the case at bar, appellant has contended that the appellee in its findings restricted the territorial rights of appellant under the "grandfather" clause, not because of lack of substantial evidence to support appellant's claimed territory, but in order to make the finding of appellant's operating rights fit the territory of the certificate which the appellee had already granted to Ziffrin Truck Lines, Inc., the common carrier company.

## CONCLUSION

The appellant concludes that the court below erred in sustaining the order of the appellee, Interstate Commerce Commission denying appellant a permit to which it is lawfully entitled under the provisions of the "grandfather" clause of the Motor Carrier Act of 1935, 49 Stat. 552, and thereby totally destroying appellant's business

of a value of more than $500,000.00, and which has been in continuous existence since 1933.

The appellant further concludes that the first finding in the subject order of the Interstate Commerce Commission, the finding which limits the scope of appellant's proposed operating rights as to territory and commodities, is the result of the rejection of uncontroverted evidence and that this finding and the judgment of the court below which sustained the finding, deny due process of law to appellant and are contrary to law.

The appellant further concludes that the appellee, Interstate Commerce Commission in its order MC 2511 approved May 29, 1941, and the court below in sustaining that order erroneously applied Section 210 of Part II of the Interstate Commerce Act, effective September 18, 1940, to a record made September 12 and 13, 1938, when the applicable section was Section 210 of the Motor Carrier Act of 1935, and that if the facts of record are to be viewed in the light of the then applicable statute, there was no prohibition in the law against the granting of a permit to appellant. If Section 210 of Part II of the Interstate Commerce Act, effective September 18, 1940, is to be applied, then appellant has been denied its day in court, and has not been afforded its lawful opportunity of submitting evidence as to the relation between appellant and the common carrier company subsequent to the passage of Section 210 of Part II of the Interstate Commerce Act, effective September 18, 1940.

The appellant further concludes that the appellee, Interstate Commerce Commission, in its order MC 2511, approved May 29, 1941, and the court below, in sustaining that order, erred in finding that the holding of a permit by appellant would not be consistent with the public in-

terest and with the national transportation policy, and that such finding of the appellee is based upon assumptions and not upon evidential facts in the record.

It is appellant's further conclusion that appellant should have an opportunity to submit evidence to the appellee under the provisions of the law as it now exists, to show appellant's full compliance therewith, which appellant is ready, able and willing to do if opportunity be afforded it. The appellant believes that irrespective of which statute is found to be applicable, that it has been denied due process of law, and that this cause should be reversed and remanded to the court below for further proceedings appropriate to the order of this court.

Respectfully submitted,

IRA HOWELL ELLIS,
JOHN S. POWELL,
*Counsel for Ziffrin, Incorporated,*
*Appellant.*

## APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ZIFFRIN, INCORPORATED,
a Corporation, et al.,
*Plaintiff,*

vs.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, et al.,
*Defendants.*

Civil Action
No. 448

## SPECIAL FINDINGS OF FACT

Pursuant to Rule 52 of the Rules of Civil Procedure, the court now states its Special Findings of Fact, as follows:

I

That, on February 4, 1936, the plaintiff, Ziffrin, Incorporated, of Indianapolis, Indiana, filed an application with the Interstate Commerce Commission pursuant to section 209 (a) of the Motor Carrier Act, 1935, for a permit authorizing the continuance of operations as a contract carrier by motor vehicle in interstate commerce or foreign commerce of general commodities from certain designated points in Indiana to points and places in Indiana, Ohio, Kentucky, Illinois, western Iowa, southeastern Wisconsin, West Virginia, to Buffalo, New York, Pittsburgh, Pennsylvania, and St. Louis, Missouri, over irregular routes.

II

That this application was referred to a field representative of the Commission to investigate the nature and extent of plaintiff's operations, and as a result of his report

the Commission, on March 5, 1938, issued a so-called compliance order authorizing plaintiff to engage in contract carrier transportation by motor vehicle according to specifications set forth therein. This order provided for the filing of protest within thirty days of this entry; such protest was duly filed; the compliance order was vacated pursuant to its terms; and the application was set down for formal hearing before an examiner.

III

That the protest referred to above called the Commission's attention particularly to the relationship of plaintiff to Ziffrin Truck Lines, Inc., a common carrier, disclosed by Commission's Docket No. M. C. 2510, and alleged that issuance of a permit to plaintiff would violate Section 210 of the Motor Carrier Act.

IV

That, accordingly, the notice of hearing on plaintiff's application stated that inquiry would be made into the relationship between plaintiff and Ziffrin Truck Lines, Inc., in the light of the provisions of Section 210 of the Motor Carrier Act, 1935. Reference was made to Section 5 (6) of Part I of the Interstate Commerce Act as then constituted, for the purpose of indicating that the scope of the inquiry would include the question as to control or management in a common interest of the plaintiff and Ziffrin Truck Lines, Inc.

V

That, in due course, plaintiff's application was referred to an examiner. Evidence was fully developed by plaintiff and other parties to the proceeding on the issues raised by the application, the protest and the notice of hearing.

VI

That, after an unfavorable report by the examiner, the case was reviewed by Division 5 of the Commission on plaintiff's exceptions to the examiner's report and on oral argument. On May 29, 1941, the Division issued a report finding that plaintiff was in operation on July 1, 1935, and continuously since that time as a contract carrier of certain commodities between specified points and destinations. A permit was denied, however, because it was found that plaintiff and Ziffrin Truck Lines, Inc., the common carrier, were owned, controlled and managed in a common interest, and that under Section 210 of the Act the holding of a permit by the plaintiff, authorizing contract carrier operations, would not be consistent with the public interest and with the national transportation policy. Plaintiff's application for reconsideration was denied by the full Commission on September 29, 1941.

VII

That the complaint in this case was filed on October 21, 1941, and answers were duly filed on behalf of the United States and the Interstate Commerce Commission. Argument was had and the case submitted on final hearing on January 17, 1942. At the hearing plaintiff introduced in evidence a certified copy of the record before the Interstate Commerce Commission, and certain additional evidence designed to show the extent of the damage to plaintiff from the operation of the Commission's order.

VIII

That on the issue under Section 210 as to the relationship between Ziffrin Truck Lines, Inc., the common carrier, and plaintiff, the record before the Commission

showed that Sam Ziffrin was the president and general manager of both concerns. At the time of the hearing the board of directors, the officers and the sole stockholders of the plaintiff corporation were Sam Ziffrin, Mrs. R. Levi, S. O. Berman, and Lewis Berger. Mrs. Levi is Sam Ziffrin's sister. Apparently she took some part in the corporate affairs; Ziffrin testified that she attended directors' meetings regularly. Ziffrin testified that Berger had not attended a directors' meeting in over two years, and Berman had attended only one meeting during the year preceding the hearing. The stock of plaintiff corporation consisted of 1,000 shares. Sam Ziffrin owned 495 shares, and his sister, Mrs. Levi, owned 15 shares. Mr. Berman owned 390 shares and Mr. Berger 100 shares. In the common carrier company, Sam Ziffrin owned 98 per cent of the stock, and the remaining 2 per cent was owned by members of his family. The officers, directors and stockholders of that concern were Sam Ziffrin, Esther Ziffrin, his wife, and David and Lewis Ziffrin, his sons. Mrs. Ziffrin was also assistant treasurer of the plaintiff corporation. Other evidence of close relation between the two companies is to be found in the joint use of equipment and employees, which the record plainly disclosed. Sam Ziffrin represented both the common and contract carriers in their dealings with shippers.

IX

That there was sufficient substantial evidence presented to the Commission to sustain its conclusion and order.

Sherman Minton
Judge, United States Circuit Court of Appeals.

Robert C. Baltzell
Judge, United States District Court.

John P. Barnes
Judge, United States District Court.

Dated this 4th day of June, 1942.

CONCLUSIONS OF LAW

Upon the above and foregoing Special Findings of Fact, the court now states its Conclusions of Law, as follows, to-wit:

I

That the law is with the defendants; that there is substantial evidence to support the order of the defendant, Interstate Commerce Commission, and that the complaint should be dismissed for want of equity.

II

That the defendants should recover of and from the plaintiff their costs herein, taxed at $.....

Sherman Minton
Judge, United States Circuit Court of Appeals.

Robert C. Baltzell
Judge, United States District Court.

John P. Barnes
Judge, United States District Court.

Dated this 4th day of June, 1942.

DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

No. 448 Civil

ZIFFRIN, INCORPORATED, a Corporation,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION

Before the Honorables, Sherman Minton, U. S. Circuit Judge, and Robert C. Baltzell and John P. Barnes, District Judges.

Come now the parties by their respective attorneys and the Court having heard the evidence and argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

Upon the foregoing special findings of fact and conclusions of law, it is,

ORDERED, ADJUDGED AND DECREED:

1. That this cause be and the same is hereby dismissed for want of equity.

2. That the defendants recover of and from the plaintiff their costs, herein taxed at $———.

(Signed)

Sherman Minton,
Judge, United States Circuit Court of Appeals.

Robert C. Baltzell,
Judge, United States District Court.

John P. Barnes,
Judge, United States District Court.

## APPENDIX "B"

Section 209 of the Motor Carrier Act of 1935, August 9, 1935, 49 Stat. 552, U. S. Code, Sup. 1, Title 49, Section 309.

(a) No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission authorizing such person to engage in such business: Provided, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions

of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: Provided further, That nothing in this part shall be construed to repeal, amend or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the policy declared in section 202 (a) of this part; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and

from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6): Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

## APPENDIX "C"

Section 5 (6) of Part I of the Interstate Commerce Act, 49 Stat. 218.

(6) It shall be unlawful for any person, except as provided in paragraph (4), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (7), the words "control or management" shall be construed to include the power to exercise control or management.